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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 682

COVINGTON MILLS, ALABAMA MILLS, INC., ET AL

Petitioners

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The Petitioners respectfully pray that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia Circuit, to the end that this Court may review a judgment which the said Court of Appeals has rendered in the above-entitled cases.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals has not yet been reported. It appears hereinafter as Appendix A.

The final opinion rendered in the District Court is reported at 129 F. Supp. 740. It is also reproduced as Appendix B hereinafter.

The opinion rendered in the District Court upon motions for preliminary injunction has not been reported. It appears hereinafter as Appendix C.

JURISDICTION

The judgment of the Court of Appeals, which the Petitioners seek to have this Court review, was rendered on December 1, 1955 and was on that date entered upon the records of that Court.

After judgment was rendered in the Court of Appeals, the appellees, now petitioners, applied for a rehearing by the Court in banc. This was, on January 10, 1956, denied.

Jurisdiction in this Court to review the judgment of the Court of Appeals, through the issuance of writ of certiorari, is established by the provisions of 28 U.S.C. 1254.

QUESTIONS PRESENTED

Does the Walsh-Healey Act[1] give the Secretary of Labor authority to determine and prescribe, for all work on Government contracts in a given industry, a single, uniform and Nation-wide minimum wage?

Does the Act give the Secretary of Labor authority thus to determine and prescribe a single and uniform minimum wage for the Nation's entire textile industry, in which it is undisputed that minimum wages widely vary?

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[1] 41 U. S. C. 35(b).

Is the determination here in question invalid upon further grounds:—That the Secretary of Labor failed to apprise interested parties of the issues which would govern his determination; that he admitted evidence into the record after the close of his administrative hearing and then rested his determination in large part on such evidence; that he had such preconception with respect to his determination as to preclude impartial decision upon the record; and that he completely misinterpreted the "open market" exemption in the Statute?

STATUTES INVOLVED

Public Contracts Act of 1936, generally known as the Walsh-Healey Act, 41 U.S.C. 35:

> In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:
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> . . .
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> "That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the pre-

vailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;"

Amendment of June 30, 1952, generally known as the Fulbright Amendment to the Walsh-Healey Act, 41 U. S. C. 43a:

"(a) Notwithstanding any provision of section 1003 of Title 5, sections 1001-1011 of Title 5 shall be applicable in the administration of sections 35-39 and 41-43 of this title.

"(b) All wage determinations under section 35(b) of this title shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in section 1009 of Title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

"(c) Notwithstanding the inclusion of any stipulations required by any provision of sections 35-45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and

the interpretation of the terms 'locality' 'regular dealer', 'manufacturer' and 'open market' ".

Administrative Procedure Act, 5 U. S. C. 1009(e):

"It (the reviewing Court) shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . . or in excess of statutory jurisdiction, authority or limitations . . . "

STATEMENT OF THE CASE

On January 15, 1953, the Secretary of Labor, purporting to act under the provisions of the Walsh-Healey Act, quoted above, issued a minimum wage decree or determination "for the textile industry" (9-14, 18-51)[2]. In this determination the Secretary determined and prescribed, for all work on Government contracts[3] in the textile industry, a single, uniform and Nation-wide minimum wage.

Shortly after the issuance of this determination, the present suits were filed in the United States District Court for the District of Columbia for the purpose of obtaining judicial review of the Secretary's action[4].

This Court had held, in 1940, in *Perkins, et al vs. Lukens Steel Co., et al,* 310 U. S. 113, that private parties had no standing to obtain such review, but in 1952 Congress had

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[2] Unless otherwise indicated, all page references are to the printed Joint Appendix filed in these cases in the Court of Appeals.

[3] Except contracts less than $10,000 in value.

[4] The Secretary of Labor may be sued, of course, only in the United States Courts for the District of Columbia—the District of Columbia being his official place of residence

specifically provided to the contrary, in the Fulbright Amendment to the Walsh-Healey Act, that the Secretary's wage determinations under the Act should be subject to Court review at the instance of private parties. It is conceded (240) on all sides that, by virtue of this amendment to the Act, some, at least, of the plaintiffs, now petitioners, do have complete standing to obtain judicial review of the wage determination here in question[5].

Throughout the case[6], the central issue upon the merits has been: Whether the Walsh-Healey Act gives the Secretary of Labor the power to require persons doing business with the Government to conform to a single and uniform Nation-wide wage standard which he determines and prescribes for their entire industry—or whether the Act gives the Secretary instead a more limited power to require such persons to conform to the wage standards which he finds and determines to be prevailing in their respective localities.

The case first came before District Judge Henry A. Schweinhaut, upon plaintiffs' motions for preliminary in-

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[5] The Secretary of Labor has contended that various other of the plaintiffs, despite the Fulbright Amendment to the Walsh-Healey Act, do not have such standing. It would seem especially fruitless, however, to enter into discussion of these contentions in this the Court of last resort—it being conceded that there are a number of the plaintiffs who, beyond all question and challenge, do have standing to litigate the merits of the case to a conclusion.

[6] The present cases having been consolidated (239) and handled together throughout, they will be herein referred to in the singular.

junction. Addressing himself to the basic issue as to whether the "locality" language of the Statute would permit the Secretary to determine one Nation-wide minimum wage for an industry, Judge Schweinhaut's ruling was that " 'locality' clearly does not mean the United States of America" (123) and that therefore he was of the opinion that the Secretary's determination had not been arrived at "agreeably to the requirement of the statute" (123)[7].

A preliminary injunction (127) was thereupon granted[8] but, advertent to two criticisms which had been voiced by this Court in the *Lukens* case, that is, that the determination there involved had been generally stayed from going into effect and that such injunction had been obtained without the plaintiffs' there incurring any specific obligations, Judge Schweinhaut, in the present case, limited relief to the plaintiffs before the Court and directed, pending the resolution of the case, that whenever any plaintiff might obtain a Government contract, it should file a bond for each such contract.

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[7] Appendix C.

[8] Judge Edward A. Tamm came to the same conclusion in granting preliminary injunctions in the following cases in the District Court:

The Allendale Company, et al vs. James P. Mitchell, Secretary of Labor—Civil Action No. 1630-54.

Central Pennsylvania Open Pit Mining Association, et al vs. James P. Mitchell, Secretary of Labor—Civil Action No. 4962-55.

Ruth Elkhorn Coals, Inc., et al vs. James P. Mitchell, Secretary of Labor—Civil Action No. 5052-55.

This limitation in the scope of the injunction and this requirement as to security have been maintained throughout all subsequent stages of the case[9].

When the case came on for final judgment in the District Court, Judge Alexander Holtzoff reached the conclusion that the determination in question is in "contravention of the Statute" under which it was promulgated and is therefore "invalid" (274)[10].

From this judgment the Secretary of Labor appealed to the United States Court of Appeals for the District of Columbia Circuit[11]. In the Court of Appeals the case was heard and decided by a three-judge division or panel. This division reversed the judgment of the District Court but itself divided, two to one, in reaching a decision. Chief Judge Edgerton and Judge Danaher constituted the division majority. Judge Washington dissented.

The plaintiffs, now petitioners, filed application for a rehearing of the case by the full Court. This was denied, though two members of the Court, other than Judge Washington who had dissented in the decision on the merits, namely, Judge Wilbur K. Miller and Judge Bastian, voted in favor of a rehearing in banc.

Thereafter, a thirty day stay, though opposed by the

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[9] The records in the Office of the Clerk of the District Court show that up to the present time there have been filed in the case 285 bonds, totaling $570,000.00 in amount.

[10] Appendix B; 129 F. Supp. 740, 743.

[11] So did the intervenor defendants, who during the proceedings in the District Court, had been allowed to join themselves as parties defendant, supporting the Secretary's determination.

Secretary of Labor and one of the intervenor defendants, was granted by the Court of Appeals pending the filing of this petition for writ of certiorari.

REASONS FOR ALLOWANCE OF WRIT

This case presents "an important question of federal law which has not been, but should be, settled by this Court"[12]. The matter at issue is of vital import—both in respect to the principle involved and in practical bearing upon the economy of the country.

Congress has enacted legislation[13] for the express purpose of bringing about "ultimate judicial resolution" of the question presented. The Secretary of Labor has himself so recognized and stated:

> "Congress inquired into the problem in 1952, and made provision for its solution . . . Congress disposed of this question by granting to the parties adversely affected by the Secretary's determinations the right to take the question to court for ultimate judicial resolution"[14].

Thus far, however, the matter in controversy has not been by any means clearly or definitively resolved in court. The

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[12] Rule 19 of this Court.

[13] The Fulbright Amendment to the Walsh-Healey Act, 41 U. S. C. 43a.

[14] Decision by James P. Mitchell, Secretary of Labor—In the Matter of Determination of Prevailing Minimum Wages for the Woolen and Worsted Industry. January 27, 1954. 19 Fed. Reg. 535.

only judicial consideration of the issue has been in the United States Courts for the District of Columbia, since, as hereinabove noted, litigation against the Secretary of Labor cannot be conducted elsewhere. But in these Courts there is an unusual divergence of judicial opinion upon the question.

As has been pointed out, the present case was heard in the Court of Appeals by a three-judge division, which itself divided in reaching a decision. It is submitted that the dissent of Judge Washington is highly persuasive and deserves careful consideration.

The ruling of the division majority was admittedly in conflict with the earlier decision of the same Court of Appeals in *Lukens Steel Company, et al vs. Perkins, et al,* 107 F 2d 627[15]. That decision against the Secretary of Labor had, of course, been reversed by this Court—but purely on the matter of standing to sue. This Court did not in that case address itself in any way to the merits of the problem[16].

As has been noted, three able Judges in the District Court separately reached the conclusion that the view later adopted by the division majority in the Court of Appeals is untenable.

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[15] The opinion of the division majority in the present case was written by Judge Edgerton, who had dissented in the *Lukens* case. His dissent in the *Lukens* case was directed, however, not to the merits but to the question of standing to sue.

[16] Moreover, as will be hereinafter pointed out, the *Lukens* case, upon the merits, was not as strong against the Secretary of Labor as is the present case. And in upholding the Secretary here, the division majority went even beyond the position which the Court of Appeals had refused to take in the *Lukens* case.

Thus of all the Judges who have considered the merits of the question here at issue, six, including three Judges of the Court of Appeals, have rejected the position taken by the two who constituted a majority of the division which sat in the present case.

Likewise, as has been hereinabove mentioned, upon the Petitioners applying for a rehearing of the present case by the Court of Appeals in banc, two Judges other than Judge Washington, who had dissented from the decision of the division majority, voted in favor of such rehearing. Judge Washington, apparently considering that the case should move along to this Court, was not himself recorded in favor of rehearing.

To all of this variety and divergence of opinion among the Judges who have considered the matter, might be added the noteworthy fact that the Secretary of Labor has officially conceded that he is himself, "not wholly free from doubt"[17] as to whether he has the authority to make such a determination as is here in issue.

It is respectfully submitted that the situation is indeed one calling for settlement by this Court.

That the ruling by the division majority in the Court of Appeals in the present case is not a true and correct resolu-

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[17] Decision by James P. Mitchell, Secretary of Labor—In the Matter of Determination of Prevailing Minimum Wages for the Woolen and Worsted Industry. January 27, 1954. 19 Fed. Reg. 535.

tion of the matter, is to be seen in the following considerations[18].

The Walsh-Healey Act provides that to be eligible to receive a Government contract, an employer must pay wages "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract"[19].

The question is whether this gives the Secretary of Labor authority to fix a uniform Nation-wide minimum wage floor for an industry, so that all who do business with the Government in that industry shall pay no wage below that floor—notwithstanding, of course, that they already comply, and must comply, with the wage minimum prescribed by Con-

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[18] Although space does not permit the outline of argument on matters other than the central issue of the Secretary's failure to observe the "locality" limitation of the Act, there are other and further grounds upon which the Petitioners contend that the determination in question was unlawful and invalid. Thus, the record shows that the Secretary failed to apprise interested parties of the issues which would govern his determination; that he admitted evidence into the record after the close of his administrative hearing and then rested his determination in large part on such evidence; that he had such preconception with respect to his determination as to preclude impartial decision upon the record; and that he completely misinterpreted the "open market" exemption in the Statute. These matters are developed in the brief for appellees in the Court of Appeals, pp. 44-52, and if opportunity is granted, will be more fully presented to this Court.

[19] 41 U. S. C. 35(b).

gress for industry generally in the Fair Labor Standards Act[20].

More specifically, as hereinbefore expressed, the central issue is: Whether the Walsh-Healey Act gives the Secretary of Labor the power to require persons doing business with the Government to conform to a single and uniform Nation-wide wage standard which he determines and prescribes for their entire industry—or whether the Act gives the Secretary instead a more limited power to require such persons to conform to the wage standards which he finds and determines to be prevailing in their respective localities.

That the Secretary's power is the latter of these and not the former, would seem to be established by a natural and unstrained reading of the language of the Act. The words "in the locality" simply do not permit the Secretary to fix minimum wages on a Nation-wide basis—unless indeed "ordinary English words have lost all meaning"[21].

Congress must be accredited with some degree of intelligence in the use of language. If so, then it is certainly not

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[20] Since a general minimum wage of $1.00 per hour will, by reason of the 1955 amendment to the Fair Labor Standards Act, become effective on March 1, 1956, and since the minimum wage prescribed by the Secretary in the present case is the same figure, question might occur as to whether the case is thereby rendered moot. Such circumstance does not by any means, however, render the case moot, for not only is the question of the Secretary's authority an issue of vital and continuing importance, but possible claims for back wage liabilities are directly at stake—with respect to which, as pointed out above, the petitioners have already filed with the Clerk of the District Court bonds in the amount of $570,000.00.

[21] *United States vs. CIO*, 335 U. S. 106, 128.

to be considered as enacting a United States Statute and employing therein the word "locality" to describe and refer to the whole United States[22].

If there could be any doubt about this, it is certainly put at rest by the pertinent and positive legislative history—which the division majority below completely ignored.

The Walsh-Healey Act grew out of two bills, S. 3055, 74th Cong., 1st Sess. and H. R. 11554, 74th Cong., 2nd Sess., on which, "extensive hearings" were held by the House Judiciary Committee. These bills gave the Secretary of Labor very wide discretion to prescribe uniform minimum wages over the country substantially as he might see fit.

They evoked voluminous and vigorous protest, that vested with authority to require uniform industry-wide minimum wage levels in broad areas, or indeed over the whole Nation, the Secretary would deprive many small manufacturers outside the large industrial centers of all opportunity to obtain Government contracts and would thereby increase the centralization of industry and the monopolization of Government business by the large corporations. It was stressed that there was great need to "encourage" small manufacturing establishments throughout the country; that "should wage differentials be entirely excluded . . . thousands of small manufacturers would be eliminated in bidding"; and that

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[22] The division majority below, in its opinion, said it did not agree "that a large group of States can never be a 'locality' ". But the question presented by this case is not whether the term "locality" in a United States Statute might reasonably mean "a large group of States" as was the issue in the *Lukens* case, but whether "locality" in a United States Statute can reasonably be considered as meaning the entire United States.

it was inevitable and indeed salutary that there should be variation in wage scales "in different parts of the country and in communities of different size, with varying conditions."[23]

The result was that neither of these bills was reported out by the House Committee instead, an entirely new bill was written, which the Secretary has aptly described as a "compromise" of "the different views expressed during the hearings." This new bill[24] was adopted after debate by the House, and by the Senate without debate, and became known as the Walsh-Healey Act.

The sponsors of this bill, in presenting it to Congress, were emphatic and unanimous:[25]

> Mr. Greenwood: "Mr. Speaker, this resolution from the Committee on Rules provides for consideration of what is known as the Walsh-Healey Bill, which Bill regulates specifications in connection with the purchase of supplies by the Government of the United States. It provides that no less than *the prevailing minimum wage* shall be paid to workers *in the community where the supplies are manufactured or where the work is performed*. . . . The Government in buying its supplies

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[23] H. R. hearings on S. 3055, 74th Cong., 1st Sess., pp. 58, 63, 87, 88, 91, 94, 95, 393, 397, 440.

H. R. hearings on H. R. 11554, 74th Cong., 2nd Sess., pp. 237, 239, 245, 249, 250, 251, 391, 302-304, 309, 313, 393, 402-412, 422-436, 440.

[24] Identified as an amendment of and substitute for S. 3055.

[25] Unless otherwise indicated, italics, for emphasis, are petitioners'.

should lead the way . . . and should provide a *minimum wage according to the scale prevailing in the community.* . . . This Bill provides that they (contractors for Government work) shall pay *the prevailing wages in the community where the work is performed.* . . ."[26]

. . .

Mr. Healey: "This Bill does not set the standard for minimum wages by reference to the codes that obtained under N. R. A., but definitely sets it as the prevailing minimum wage for similar work or in the industries operating *in the locality in which the contract is to be performed.*"[27]

. . .

Mr. Citron: "The Bill merely provides that the Government shall have the right to refuse the bids on all purchases over $10,000 to those . . . who pay less than the prevailing rate of wages *in their community.* . . ."[28]

. . .

Mr. Ayers: "This Bill also provides for prevailing wages *in the locality where the work is done.*"[29]

. . .

Mr. Mischener: "It permits the Secretary of Labor, Madam Perkins, to determine what the prevailing

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[26] 80 Cong. Rec. 9992-9993.

[27] 80 Cong. Rec. 10002.

[28] 80 Cong. Rec. 10008.

[29] 80 Cong. Rec. 9286.

minimum wages are *in the locality in which the materials are to be manufactured or furnished.*"[30]

. . .

Mr. Sirovich: "The Walsh-Healey Bill makes it mandatory for all agencies that deal with the United States Government to accept the prevailing wages *in the respective localities* in which the materials, supplies, articles or equipment are to be manufactured or furnished under said contract[31] . . . The minimum wage law in this Bill can fix wages *depending upon what the local community in that particular section where the contract is taken pays for similar work.*"[32]

Congressman Healey, upon being asked whether "the real purpose of the Bill" was to empower the Secretary of Labor to set wages "throughout the country", exclaimed "Oh, no"[33]. And Senator Walsh, in offering an amendment to the Act a year after its enactment, said:

> "It is evident that the legislative intent of the present minimum wage section was to direct the administrative authority to give effect to geographic differentials"[34].

From all of which it is abundantly clear that Congress specifically understood and emphatically intended that mini-

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[30] 80 Cong. Rec. 10006.

[31] 80 Cong. Rec. 10012.

[32] 80 Cong. Rec. 10015.

[33] Hearings on H. R. 11554, 74th Cong., 2nd Sess., pp. 124-125.

[34] 80 Cong. Rec. 3503-3504.

mum wage determinations under the Statute which they were enacting should be made by localities and not on any uniform Nation-wide basis.

Yet, in the present case, not even purporting to determine and prescribe for the various localities of the textile industry "what the prevailing minimum wages are in the locality" or "the scale prevailing in the community"—the Secretary of Labor has instead declared and decreed one uniform and Nation-wide minimum wage for the entire industry[35]. In this he flatly disobeyed the "locality" restriction which Congress advisedly, deliberately and pointedly wrote into the Act. And the opinion of the division majority below overrides the language of the Statute and totally ignores its legislative history to sustain the Secretary's action.

The reasoning of the opinion is that if manufacturers are allowed to perform Government contracts at the wages which the Secretary finds to be prevailing in their respective localities, then some Government business will go to manufacturers in the lower wage-paying localities and the objective of eliminating such manufacturers from Government business will not have been fully accomplished. "Only an industry-wide minimum", says the division majority, can fully accomplish this purpose.

But the division majority assumes the whole case when it assumes that in the Walsh-Healey Act Congress intended *fully* to accomplish such purpose. The vital point of the case

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[35] It is undisputed that minimum wages in the textile industry are in fact not uniform but are characterized by a variety of geographic differentials. (160-162, 211-214)

is that the Walsh-Healey Act *does not go the whole way* toward requiring uniformity of wages among those who compete for Government business.

Both the language and the history of the Act set forth a middle-ground position in which Congress went part of the way, but not all the way, toward requiring uniform wages —not creating authority to compel all manufacturers in an industry to conform to a single standard, and not leaving them free to pay wages as low as they might see fit either— but creating instead authority to compel them, if they desire Government business, to come up to and maintain the prevailing wage levels of their respective localities.

It is of course true that in enacting this legislation, Congress was concerned with the problem of Government business going to "firms that pay sub-standard wages"[36]. But the question at the heart of the case is:—"sub-standard" by what standard? Both the language and the history of the Act answer this question clearly:—that a manufacturer may not have Government business if his wages are sub-standard in relation to the wage level which prevails in his locality[37].

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[36] Determination in present case, Joint Appendix, p. 28, 18 Fed. Reg. 472.

[37] The opinion of the division majority suggests that this becomes reductio ad absurdum when it is considered that there may be no other manufacturer of the same type in the locality. The answer in turn to this is that the Secretary has a wide descretion as to what he will define as a "locality"— though certainly he may not reasonably term the entire United States one "locality", as he has undertaken to do in the present case. Moreover, the Statute expressly authorizes him in determining a minimum wage standard to look to "similar industries or groups of industries" in the locality.

In his dissenting opinion Judge Washington penetrated to this, the crux of the matter, and pointed out that the Walsh-Healey Act has "a restricted objective: that of preventing contractors from cutting wages below prevailing community levels".

Neither the language nor the history of the Act permit the assumption that the Act intends to judge a manufacturer's fitness for Government business by comparing his wages with those of other manufacturers in his industry throughout the whole United States—no matter that this would indeed be the method which would go furthest toward eliminating "low-wage concerns". As Judge Washington concisely emphasizes: "Our function is to determine what Congress thought desirable, rather than to give expression to our own views on social legislation".

The Fair Labor Standards Act[38] is apt example that when Congress desires to set up uniform and Nation-wide wage standards, it is not lacking either in authority or ability to say so. As Judge Washington observes: "Surely it is better to reach decisions of that sort through congressional debate and action, rather than through strained administrative and judicial interpretation of a statute passed years ago for a different and more limited purpose".

It is respectfully submitted that this is a case in which the division majority below simply overrode the language of the Statute in order to implement what it conceived to be "the policy of the legislation as a whole"—*notwithstanding that the "locality" wording of the Statute contradicts such a policy and notwithstanding that those who wrote the*

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[38] 29 U. S. C. 201.

Statute and procured its enactment expressly and positively declared that such was not its policy.

As is aptly stated in the concurring opinion of Justice Frankfurter in *Youngstown Sheet and Tube Company, et al vs. Sawyer:*

> "It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between (the executive) and Congress".
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> *Youngstown Sheet and Tube Company vs. Sawyer*, 343 U. S. 579, 609

At one point the opinion of the division majority seems to suggest that, by the language of the Statute itself, the "locality" limitation does not apply to all methods of wage determination provided in the Act. The opinion takes no note of the fact that this theory, as long ago as the *Lukens* case, was abandoned by the Secretary of Labor as not comporting "with the statutory language"[39]; that the Secretary, as recently as 1952 when the Fulbright Amendment was under consideration, held no such view of the Act[40]; and that

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[39] Brief for Secretary of Labor, filed in this Court in *Perkins, et al vs. Lukens Steel Company, et al*, p. 131.

[40] Hearings on S. 2594, 82nd Cong., 2nd Sess., p. 2475, et seq. 2481 et seq.

certainly, as the legislative history above referred to positively shows, Congress was innocent of any such concept and expressly intended that all wage determinations under the Act should be subject to the "locality" limitation.

Nevertheless, says the division majority's opinion, the Secretaries of Labor, purporting to act under this Statute, have "during many years" prescribed uniform minimum wages on a Nation-wide basis for various industries and since this "practice" has been long continued without repudiation, it should not now be interfered with.

As to this it is first to be noted that if a "consistent" administrative practice has been consistently wrong, then "no amount" of it "is binding upon the Courts"[41]. Next it must be remembered that prior to the instant case the one and only Court which ever examined the Secretary's practice on the merits, namely the Court of Appeals for the District of Columbia Circuit, did repudiate it[42], and that then the doors of the Courts were closed to all review of the matter and have only swung open again with the present case.

To quote again from Judge Washington's opinion: "As far as the argument based on continued administrative interpretation is concerned, I would suppose that we were not entitled to give much weight to action which was until a short time ago completely immune to judicial review".

But, says the opinion of the division majority, the Secre-

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[41] *Texas and Pacific Railway Company vs. United States*, 289 U. S. 627, 640.

[42] It will be recalled that the Secretary was repudiated in treating a group of States as a "locality", whereas he has here treated the whole United States as such.

tary's practice was "called to the attention of committees of Congress", yet Congress wrote no new legislation to require him to change such practice. The committee records vividly show, however, the amazement with which members of Congress, as late as 1950 and 1952, learned that the Secretary was determining minimum wages under the Act on a Nationwide and not on a locality basis[43].

And in 1952 Congress did amend the Act specifically to provide that this "practice" which had been immune to court review should instead be subject to court review. In this, Congress was certainly not approving the Secretary's actions. Indeed the Secretary has officially conceded that Congress has "not" seen fit to "affirm the past practices" of the Secretaries of Labor under the Walsh-Healey Act, but has "left the matter to resolution of the courts"[44].

Upon all of the foregoing—the importance of the issue presented, the disparity of judicial opinion upon the matter, the expressed intent of Congress that the question shall be fully examined and decided in Court, and the force of the considerations which oppose the ruling of the division majority below—it is respectfully submitted that the question at issue is one which should be resolved by this Court.

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[43] Hearings before subcommittee of House Committee on appropriations. H. R. 6008, 81st Cong., 1st Sess., pp. 69-71. Hearings on S-2594, 82nd Cong., 2nd Sess., pp. 2481-2482, 2706, 2708.

[44] Decision by James P. Mitchell, Secretary of Labor—In the Matter of Determination of Prevailing Minimum Wages for the Woolen and Worsted Industry. January 27, 1954. 19 Fed. Reg. 535.

CONCLUSION

For the reasons and upon the grounds herein set forth, the petitioners pray that a writ of certiorari be granted.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12650

JAMES P. MITCHELL, Secretary of Labor, APPELLANT

v.

COVINGTON MILLS, INC., *et al.*, APPELLEES

No. 12651

JAMES P. MITCHELL, Secretary of Labor, APPELLANT

v.

ALABAMA MILLS, INC., *et al.*, APPELLEES

No. 12652

NATIONAL ASSOCIATION OF COTTON MANUFACTURERS, *et al.*, APPELLANTS

v.

COVINGTON MILLS, INC., *et al.*, APPELLEES

No. 12653

NATIONAL ASSOCIATION OF COTTON MANUFACTURERS, *et al.*, APPELLANTS

v.

ALABAMA MILLS, INC., *et al.*, APPELLEES

No. 12654

TEXTILE WORKERS UNION OF AMERICA, CIO, APPELLANT

v.

COVINGTON MILLS, INC., *et al.*, APPELLEES

No. 12655

TEXTILE WORKERS UNION OF AMERICA, CIO, APPELLANT

v.

ALABAMA MILLS, INC., *et al.*, APPELLEES

Appeals from the United States District Court for the District of Columbia

Decided December 1, 1955

Before EDGERTON, Chief Judge, and WASHINGTON and DANAHER, Circuit Judges.

EDGERTON, *Chief Judge:* The Walsh-Healey Public Contracts Act of 1936 provides that any government contract for more than $10,000 shall include a stipulation that all persons employed in manufacturing or furnishing goods under the contract will be paid "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; . . ." 41 U.S.C. § 35 49 STAT. 2036, § 1.

The Secretary of Labor determined in January 1953, after extensive hearings, that the prevailing minimum wage in the Cotton, Silk, and Synthetic Textile Branch of the Textile Industry was $1.00 per hour.

Two separate groups of textile manufacturers brought separate suits against the Secretary, under § 10(b) of the Act, 41 U.S.C. § 43a(b), to set aside and enjoin his determination as illegal.[1] By permission of the District Court the Textile Workers Union of America, CIO, The National Association of Cotton Manufacturers, Berkshire Fine Spinning Associates, Inc., Fitchburg Yarn Company and Hathaway Manufacturing Company intervened as defendants in support of the determination. The cases were consolidated for hearing in the District Court. The court awarded summary judgment to all the plaintiffs and permanently

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[1] Before its effective date, the determination was stayed as to the plaintiffs and the Secretary was temporarily enjoined from putting it into effect as to them. While that order was in force, any plaintiff who entered into a contract otherwise subject to the determination was required to post a bond to pay the prescribed wage if the determination were upheld. We entered a somewhat similar order, requiring a bond of $2,000, pending the present appeal.

enjoined the Secretary from putting the determination into effect as to any of them, on the ground that the Secretary's authority under the Walsh-Healey Act is limited by the word "locality" and that, therefore, he may not determine a minimum wage on an industry-wide basis. The Secretary and the intervenors appeal.

The policy and purpose of the Act are plain. By statute and regulation, government contracts must go to the lowest responsible bidder. Until the Walsh-Healey Act was passed, it followed that the government, though it urged industry to maintain adequate wage standards, was often compelled to undermine them by contracting with low-wage concerns. The Walsh-Healey Act sought to support standards by withholding contracts from such concerns. "This Act's purpose was to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment. As stated in the Report of the House Committee on the Judiciary . . . , 'The object of the bill is to require persons having contracts with the Government to conform to certain labor conditions in the performance of the contracts and thus to eliminate the practice under which the Government is compelled to deal with sweat shops.' " *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128. The Act's "purpose is to use the leverage of the Government's immense purchasing power to raise labor standards." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507.

The Secretary's findings of fact make it clear that in the textile industry, unlike some industries, only an industry-wide minimum will serve this purpose, because the competition is industry-wide. The District Court's construction of the Act would make it necessary for the Secretary to fix separate minima according to the wages that prevail in each separate textile community. This would freeze the competitive advantage of concerns that operate

in low-wage communities and would in effect offer a reward for moving into such communities. Obviously this would defeat the purpose of the Act. It would also make the Act nearly meaningless as applied to a large part of the textile industry, since there is frequently only one textile concern in one neighborhood and it necessarily pays the wages that prevail in its plant

Because the Walsh-Healey Act uses the word "locality," the appellees say that the plain meaning of the Act forbids the Secretary to fix an industry-wide minimum. As to the "plain meaning" of an Act of Congress the Supreme Court has said: "When that meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543.

Moreover, it is not true that the plain meaning of the Walsh-Healey Act forbids the Secretary to fix an industry-wide minimum in this case. It is not plain that every minimum wage determination under the Act must be limited to a "locality." It is not even plain that a large group of States can never be a "locality."[2] The word occurs only in the phrase "currently operating in the locality."[3] The phrase is

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[2] In *Lukens Steel Co.* v. *Perkins*, 70 App. D. C. 354, 107 F. 2d 627, this court expressed a different view. But the Supreme Court reversed the judgment of this court, and affirmed the judgment of the District Court dismissing the complaint, on the ground that the plaintiffs had no standing to sue. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. This of course left the opinion, as well as the judgment, of this court without value as a precedent.

not plainly intended to qualify any other term than "groups of industries." It may or may not be intended to qualify "the particular or similar industries." It can hardly be intended to qualify "similar work," for "work . . . currently operating in the locality" would be a strange expression. The Secretary found that a dollar an hour is the prevailing minimum on "similar work." He also found that it is the prevailing minimum in the particular industry. In our opinion these findings were fully warranted.

The Secretary's interpretation of the Act as permitting industry-wide determinations of minimum wages is not new. In this industry and many others, during many years, the Secretary has made many such determinations. See, *e.g.*, 41 C.F.R. Parts 202 *et seq.* His practice in this respect has repeatedly been called to the attention of committees of Congress. Attempts have been made to write his interpretation expressly into the Act. Attempts have also been made to write it expressly out of the Act. Both have failed. Congress has chosen to leave the interpretation of the Act to the Secretary and the courts. As the Supreme Court said in regard to a different but somewhat related statute, the Fair Labor Standards Act, "We decline to repudiate an administrative interpretation of the Act which Congress refused to repudiate after being repeatedly urged to do so." *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 17.

Appellees point out that "purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market" are exempt from the statutory requirement of a stipulation that employees will be paid not less than the prevailing minimum determined by the Secretary. 41 U.S.C. § 43, 49 STAT. 2039, § 9. But this ex-

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[3] It has been suggested that the words "in the locality" are not necessarily tied to the words "currently operating", and that "similar work . . . in the locality" is a possible reading. But since it is by no means the only possible reading it is not the "plain meaning" of the Act.

emption has nothing to do with the only matter here in issue, which is the validity of the Secretary's determination. The Secretary determined nothing with regard to the exemption. He determined that "The minimum wage for persons employed in the manufacturing or furnishing of the products of the Cotton, Silk, and Synthetic Textile Branch of the Textile Industry under contracts subject to the Walsh-Healey Public Contracts Act shall be $1.00 an hour arrived at either on a time or piece-rate basis." He did not undertake to decide to what contracts the Walsh-Healey Act, and therefore the minimum wage determination, are applicable. The complaints in these suits do not ask the court to decide that question.[4]

In our opinion the plaintiffs' other objections to the Secretary's determination are likewise invalid.

The District Court thought it need not rule on a motion of the Secretary to dismiss the complaints, on jurisdictional grounds, as to 144 of the 158 plaintiffs. But the fact that some of the plaintiffs clearly have standing, under the Fulbright Amendment, to seek review of the Secretary's

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[4] It is therefore immaterial that the Fulbright Amendment to the Walsh-Healey Act provides that review of the "applicability" of a minimum wage determination may be had by any "person adversely affected or aggrieved". 66 Stat. 308, 41 U.S.C. § 43a(b).

The Fulbright Amendment also provides that "Notwithstanding the inclusion of any stipulations required by any provision of sections 35—45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms 'locality', 'regular dealer', 'manufacturer', and 'open market'." 41 U.S.C. § 43a(c). That is, a contractor who has been required to include a minimum wage stipulation in a contract need not perform the stipulation if the requirement was not in accordance with law. This is irrelevant here.

determination, confers no standing on others. We think the District Court should decide, in the first instance, which plaintiffs have standing. *Cf. B. F. Goodrich Co.* v. *Federal Trade Commission*, 93 U.S. App. D.C. 50, 56, 208 F. 2d 829, 834. The case is remanded with instructions to rule on the motion to dismiss, unless the government withdraws it or the plaintiffs concerned consent to it. As against plaintiffs who are not dismissed, judgment should be entered for the defendant.

Reversed and remanded.

DANAHER, *Circuit Judge*, concurring: I concur in the entire opinion by Chief Judge Edgerton.

I feel impelled to say this: were it not for *Textile Workers Union of America, CIO* v. *The Allendale Company, et al.*,[1] I would dismiss 144 plaintiffs on the present record. Moreover, I believe the District Court should have denied intervention by defendants National Association of Cotton Manufacturers, Berkshire Fine Spinning Associates, Inc., Fitchburg Yarn Company, Hathaway Manufacturing Company and the Textile Workers Union of America, CIO, who are now here as appellants on the side of the Secretary. The Supreme Court held[2] in 1940 that determinations by the Secretary under the Walsh-Healey Act[3] as it then was written, are not judicially reviewable. The Act "was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain."[4] The function of the Secretary, acting in behalf of the Government, is to find the facts,[5] and make his determination which shall be conclusive upon all agencies of the United States. The Act was designed to permit the Government to supply its needs without the delays necessarily incident to judicial supervision of administrative procedure. "If the general law permits prospective bidders to challenge each wage determination of the

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[1] —— U.S. App. D.C.——, —— F. 2d ——, decided July 15, 1955. But see the dissenting opinions.

[2] Perkins v. Lukens Steel Co., 310 U.S. 113, 128 (1940).

[3] 49 STAT. 2036-2040 (1936), as amended, 41 U.S.C. §§ 35-45 (1952)

[4] *Supra* note 2, 310 U.S. at 127.

[5] § 4, 49 STAT. 2038 (1936), as amended, 41 U.S.C. § 38 (1952); (re the fact-finding function see Shannahan v. United States, 303 U.S. 596, 599 (1938)).

Secretary in the courts, by a like token all employees affected could obtain judicial review."[6] We have been advised that "Courts should not, where Congress has not done so, subject purchasing agencies of the Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies."[7] Not only do such expressions by the Court correctly, in my opinion, reflect the understanding and purpose of the Congress, but this case illustrates peculiarly the situation which Congress sought to avoid. It is now nearly three years since the Secretary's determination was promulgated, and it is no more nearly effective now than when it was first made. Yet 144 plaintiffs and 5 defendants as "parties" in the District Court still, because of their status as parties, respectively have rights of appeal no matter which way our order goes.[8]

It is said that these "parties" are thus able completely to frustrate the reasonable fulfillment of the Congressional objective because "rights" have been conferred upon them by the Fulbright amendment,[9] adopted in 1952. In terms it was provided that review "may be had within 90 days after such determination is made," and ten of the original plaintiffs sought review after the 90 day statutory period had expired. As to them the motion to dismiss should be granted. The Fulbright amendment further provided that review was to be had only "by any person adversely affected or aggrieved" by the determination. Only 14 plaintiffs have made a showing that the determination "results in direct and

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[6] *Supra* note 2, 310 U.S. at 131.

[7] *Id.* at 130.

[8] Cf. Fishgold v. Sullivan Corp., 328 U.S. 275 (1946); Boston Tow Boat Co. v. U. S. 321 U.S. 632, 633 (1944).

[9] 41 U.S.C. § 43(a) (1952).

immediate injury."[10] So, I would dismiss as to 144 "plaintiffs," leaving only the 14 in the Alabama case and none in the Covington case. The named intervening appellants by the Secretary's determination have not been subjected to or threatened with any legal wrong. They have shown no independent legal right. They are not "private Attorney Generals,"[11] and the Secretary is ably represented here by the Attorney General. Even the Fulbright amendment confers no standing upon those who appear on the side of the Secretary. I believe their intervention never should have been allowed.

This is not a case involving a determination of public convenience and necessity such as *National Coal Ass'n* v. *Federal Power Commission*.[12] This is not a case like *Columbia System* v. *United States*,[13] where "the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked." This is not a case like *Associated Industries* v. *Ickes*,[14] where by administrative order, the minimum prices at which coal could be sold were increased, thus affecting the very basis upon which transactions in the coal business could

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[10] National Coal Ass'n v. Federal Power Commission, 89 U.S. App. D.C. 135, 138, 191 F. 2d 462, 465 (D.C. Cir. 1951).

[11] Associated Industries v. Ickes, 134 F. 2d 694, 704 (2d Cir. 1943), *order vacated*, 320 U.S. 707 (1943). The able opinion by Judge Frank treats of almost every conceivable situation except that presented on the record here.

[12] *Supra* note 10. (Even there Judge Clark, in his dissent, argued well that the petitioners were not "parties aggrieved" within the meaning of the Natural Gas Act.)

[13] 316 U.S. 407, 422 (1942).

[14] *Supra* note 11.

be conducted. Nor is the case like *United States Cane Sugar Refiners' Ass'n* v. *McNutt*,[15] or *Longshoremen's Union* v. *Boyd*,[16] where the suit was dismissed for want of a "case or controversy." This is a case, *sui generis*, where "Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy. . . ."[17] No one is forced to bid for Government contracts. Not foreign to our problem are the considerations reasoned by this court in *Alabama Power Co.* v. *Ickes*.[18] I believe the Congressional interest in the attainment of the objectives of the Walsh-Healey Act and the Government's undoubted right to lay down the conditions upon which its own business will be conducted compel a strict construction of the Fulbright amendment. Any other view makes a shambles of the Walsh-Healey Act, for the delays and confusion occasioned by the hordes of "parties" render a determination obsolete and ineffective. Thus those who properly may be parties are those, and only those, who can show themselves by direct and immediate injury to have been adversely affected or aggrieved by the Secretary's determination.

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[15] 138 F. 2d 116 (2d Cir. 1943) (where the petition was dismissed for lack of jurisdiction).

[16] 347 U.S. 222 (1954). (The point is certainly present here.)

[17] Ellis v. United States, 206 U.S. 246, 256 (1907).

[18] 67 App. D.C. 230, 91 F. 2d 303 (D.C. Cir. 1937), *aff'd*, 302 U.S. 464 (1948).

WASHINGTON, *Circuit Judge*, dissenting: The central issue here, of course, is whether the Walsh-Healey Act was intended to establish a nation-wide wage standard for Government contractors, or a standard based on wages prevailing in the contractor's own community. To my mind the language of the statute clearly establishes the latter standard. This court so held in a case decided shortly after the passage of the Act. *Lukens Steel Co.* v. *Perkins*, 70 App. D.C. 354, 107 F. 2d 627 (1939). The opinion—an exhaustive one—was written by Associate Justice Justin Miller, and was concurred in by Associate Justice Fred M. Vinson, who had become a member of this court after serving in Congress during the very period in which the Walsh-Healey Act was passed. The reasoning of the opinion seems to me unanswerable. And the legislative history there recited shows with complete clarity what Congress intended: that bidders for Government contracts "shall pay the prevailing wages in the community where the work is performed."[1]

Our decision in *Lukens* was reversed by the Supreme Court on another ground—that the complainants lacked standing to sue. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940). The obstacle has now been removed by the Fulbright Amendment, passed in 1952. 41 U.S.C. § 43a (1952). Technically, in dealing with the present case, we are not "bound" by our decision in *Lukens*, even though the Supreme Court did not reach the merits of that case. But its reasoning remains sound, and has not been disturbed by anything which has happened since. As far as the argument based on continued administrative interpretation is concerned, I would suppose that we were not entitled to give much weight to action which was until a short time ago completely immune to judicial review. Nor, under the circumstances here, does congressional failure to amend an act

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[1] Congressman Greenwood at 80 Cong. Rec. 9993; quoted at p. 362 of 70 App. D.C., p. 635 of 107 F. 2d, together with numerous similar statements.

already clear on its face seem to be in any sense declaratory of the correctness of the Secretary's interpretation. The latest pronouncement of Congress—the Fulbright Amendment—certainly makes no such declaration: its passage might suggest, indeed, that Congress was not content with the Secretary's action, and wished it to be reviewed by the courts. The relevant Committee Report specifically states that failure to amend the "locality" provision of the Act is to be without prejudice to a judicial determination of the meaning of that provision. S. Rep. No. 1599, 82d Cong., 2d Sess. 31 (1952).

It is argued that to give the "locality" provision its ordinary meaning would produce an undesirable result. But—whether or not that is so—our function is to determine what Congress thought desirable, rather than to give expression to our own views on social legislation. It is also said that the purpose of the Act would be defeated by such an interpretation. But I think the majority misconceives the purpose of the Act, as revealed in the light of conditions prevailing in 1936, when it was passed. At that time, and before, it was generally thought that the Federal Government lacked power to undertake broad regulation of wages and labor standards. Control of Government contracts was thought possible, however, and in 1931 the Bacon-Davis Act was passed, imposing certain wage regulations in the field of Government construction contracts, 46 Stat. 1494. In 1935 that Act was substantially revised and strengthened, 49 Stat. 1011. The 1935 revision provided—in language derived from the earlier legislation—for wage determinations based on conditions prevailing in the "city, town, village, or other civil subdivision" where the contract is to be performed. In 1936 the Walsh-Healey Act was passed to cover the field of supply contracts. Here Congress used the "locality" provision we have been discussing. Obviously both acts are based on the same philosophy and point to a standard limited to a fairly small area and to a restricted objective: that of preventing contractors from cutting wages below prevailing community

levels in an effort to pare costs and thus be the lowest bidder. As the legislative history shows, there was no thought of raising wages, or of eliminating regional differentials. See *Lukens* at p. 362 of 70 App. D.C., 635 of 107 F.2d.

Later, of course, greater breadth of Federal power was recognized. The Supreme Court's decision in *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937), opened the door to more sweeping congressional action. Problems such as that of the "runaway industry," which were not intended to be dealt with by the Walsh-Healey Act, but which may underlie the Secretary of Labor's approach to that Act, may now be dealt with by explicit Federal legislation. Congress has gone far in this direction through the Fair Labor Standards Act and its amendments. Indeed, under an amendment shortly to come into effect, the minimum F.L.S.A. wage will be raised to a dollar an hour. Public Law 381, 84th Cong., 1st Sess. § 3 (1955). That, of course, is the same as the Secretary's determination here. Surely it is better to reach decisions of that sort through congressional debate and action, rather than through strained administrative and judicial interpretation of a statute passed years ago for a different and more limited purpose.

APPENDIX B

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 259-53

COVINGTON MILLS, ET AL,

Plaintiffs

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL,

Defendants

Civil Action No. 614-53

ALABAMA MILLS, ET AL,

Plaintiffs

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL,

Defendants

HOLTZOFF, District Judge.

This case comes before the Court on cross motions for summary judgment. The action is brought for a declaratory judgment to adjudicate an order by the Secretary of Labor to be invalid as in contravention of the statute pursuant to which it was promulgated.

The order in question fixed a minimum wage for persons employed in certain branches of the textile industry in con-

nection with Government contracts. This was done pursuant to the Walsh-Healey Public Contracts Act. The prevailing wage as determined by the order in question, promulgated on December 5, 1952, was to be the same throughout the United States.

The Walsh-Healey Act, pursuant to which this order was promulgated, 41 U.S.C.A. § 35 et seq. relates to Government contracts for the manufacture or furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000. One of the provisions of the Act is that there shall be included in each contract a representation and stipulation that all persons employed by the contractor in its performance will be paid not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract.

It is contended by the plaintiffs that under this provision the Secretary of Labor is without power to fix a single prevailing minimum wage for a particular industry on a nationwide basis. To determine whether this objection is sound it is necessary to analyze the pertinent phraseology of the Act. The Secretary of Labor is directed to determine the prevailing minimum wages for persons employed on similar work, or persons employed in the particular or similar industries, or persons employed in groups of industries. In other words, he may act under any one of these three provisions. These provisions are followed by the clause, "currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract."

It is contended by the defendants that the words "currently operating in the locality" are limited only to the last of the three alternatives, namely, persons employed in sim-

ilar groups of industries. On the other hand, the plaintiffs claim, contrary to the contention of the Secretary, that those words relate back to all of the three clauses. There is some ambiguity in the statute. It is difficult to construe it according to strict grammatical requirements. The words "currently operating" seem inapplicable to the noun "work" or to the noun "industries." It is, perhaps, an unfortunate choice of words, but it seems to the Court that the phrase "currently operating" may not be construed as being limited solely to the last of the alternatives but relates back to each of them, namely, persons employed on similar work currently operating in the locality, or, persons employed in the particular or similar industries currently operating in the locality, or persons employed in similar groups of industries operating in the locality. This is the interpretation, in the opinion of this Court, which should be accorded to those words.

In this connection, the Court wishes to call attention to the fact that when the construction of this provision was first raised in litigation in Lukens Steel Co. v. Perkins, 70 App. D. C. 354, 107 F. 2d 627, 630, the point now made by counsel for the Secretary of Labor was not advanced, but it seemed to be assumed that the words " ' currently operating in the locality' " were applicable to and limited each of the three alternatives. Apparently the present construction sought to be applied by counsel for the Secretary of Labor is more or less of an afterthought.

Since the phrase "currently operating in the locality" applies to each of the three alternatives, the next question to be determined is whether the entire United States of America can be considered as a single locality in the discretion of the Secretary. To be sure, the word, "locality" is an indefinite term. It may mean a single community. It may mean a county. It may mean a region. A considerable degree of discretion is vested in the Secretary to determine what shall constitute a "locality" for any particular purpose. So long as the construction placed by the Secretary is reason-

able, the Court may not set it aside. May it be said, within reason, that the entire United States of America may be regarded as a single "locality"? It seems to the Court that to attach this interpretation to this term would be to place a tortured interpretation and attach a distorted meaning to a simple English word.

Such a type of interpretation and construction of words was satirized by a great English satirist in the well-known book "Through the Looking Glass." This book records a dialogue between Alice and Humpty Dumpty and says:

> " 'When I use a word', Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more or less'.
>
> " 'The question is', said Alice, 'whether you can make words mean so many different things.'
>
> " 'The question is', said Humpty Dumpty, 'which is to be master—that's all' ".

The Court is not going to place its seal of approval upon that type of construction of plain English words. The Court is of the opinion that under no circumstances is it reasonable to construe the word "locality" as applicable to the entire United States of America and calling the entire country a single "locality".

The Court is especially impelled to this conclusion by the opinion of the Court of Appeals for the District of Columbia Circuit in Lukens Steel Co. v. Perkins, 70 App. D. C. 354, 107 F. 2d 627. That case involved the validity of an order under this statute, which fixed wages in the steel industry at a single figure for an area of about fourteen states and the District of Columbia and referred to them as a "locality". In an opinion written by Mr. Justice Justin Miller, in which Mr. Justice Vinson, then a member of that court, concurred, it was very cogently and persuasively held that the word "locality" may not be used to describe a broad area consisting of fourteen states and the District of Columbia. On this

point the court made the following observations, 107 F. 2d at pages 630, 631:

> "It is true that the word *locality* is one of somewhat indefinite meaning. Still, its indefiniteness has certain well recognized limits in common meaning and usage, which exclude and forbid the interpretation placed upon the word by the appellees in their determination".

And again the court stated:

> "In ordinary and common usage *locality* is synonymous in meaning with such words as *place, vicinity, neighborhood and community*. These words, also, are too indefinite to be used for purposes of exact measurement in terms of acres or square miles. But neither they nor *locality* itself, in any case, connote large geographical areas, with widely diverse interests, such as the fourteen states and the District of Columbia, grouped in the protested determination". (Emphasis original).

A *fortiori,* if fourteen states is too large an area to be deemed a single locality, it necessarily follows that the United States of America is much too large an area to be so considered.

In that case Mr. Justice Edgerton dissented. He did not disagree with the interpretation by the majority of the word "locality", but reached the conclusion that the plaintiffs had no standing to sue and for that reason and that reason alone felt that the bill of complaint should be dismissed. The Supreme Court reversed the determination of the Court of Appeals, 310 U. S. 113, 60 S. Ct. 869, 84 L. Ed 1108. The Supreme Court, however, did not discuss the views of the majority of the Court of Appeals as to what is meant by "locality", but merely held that the complaint should be dismissed on the ground that the plaintiffs had no standing to sue. This procedural obstacle was later overcome by the so-called "Fulbright Amendment", which permits judicial review of the determinations of the Secretary of Labor under

the Walsh-Healey Act pursuant to the provisions of the Administrative Procedure Act, 5 U. S. C. A. § 1001 et seq.[1]

The Court is impressed with arguments made by counsel as to the administrative difficulty that would be created if the Secretary of Labor were not to be permitted to make nation wide determinations under the Walsh-Healey Act. The Court is further impressed with the argument that it is desirable from a social and economic standpoint in some instances to fix the rate of prevailing wages on a nation wide basis. The Court expresses no opinion on these points because they are not for the judiciary to determine. These arguments should be addressed to the Congress, because they relate to policy and expediency and not to the interpretation and the meaning of what the Congress has already enacted.

Accordingly, the Court will hold that for the reasons stated the order of the Secretary of Labor here involved is invalid as in contravention of the statute, and will deny defendants' motion for summary judgment and grant the plaintiffs' cross motion for the same relief.

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[1] 41 U. S. C. A. § 43a, added June 30, 1952, 66 Stat. 308.

APPENDIX C

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 259-53

COVINGTON MILLS, ET AL,

Plaintiffs

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR,

Defendant

Civil Action No. 614-53

ALABAMA MILLS, ET AL,

Plaintiffs

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR,

Defendant

Upon Motions For Preliminary Injunction

SCHWEINHAUT, District Judge.

Gentlemen, I am persuaded that I must stay the effective date of this order. Having read this file completely—perhaps not as studiously as more time would permit, but certainly completely yesterday and last night—and having heard very able arguments and very helpful arguments today, there is very grave doubt in my mind about whether or not the Secretary arrived at his order pursuant to law.

It is my impression, shall I put it, at this time, that he did not; because it seems to me "locality" clearly does not mean the United States of America. The efforts to come up with something that would be workable and meaningful all were directed in the Congress to something less than the entire United States. Therefore, as I say, I have very grave doubts and lean to the opinion that it was not legally arrived at, in the sense that it was not arrived at agreeably to the requirement of the statute.

Then we must ask whether or not, that being so, these plaintiffs have any right to complain about it. I think they clearly do; and I think they do for two reasons: One is, I think they are aggrieved; at least, can be. They have a right, since they are in this industry to seek, even if they had not done so before, Government contracts; and it seems to me they have a right to seek them on the basis of regulations legally arrived at, and not to have the burden put upon them of contriving and fashioning a bid onerous to them, as they think, which they believe is based upon a concept that is illegal in its nature.

Also, I think that if they are right about it, and that this should turn out to be held by the Court to have been illegally arrived at, then they can indeed suffer irreparable injury, for what I think are the rather obvious reasons expressed here today.

Moreover, I think they have a standing to sue for the simple reason that the statute said they may have it. There never was a statute more clearly designed to overturn a decision of a court than this one. I speak, of course, of the Fulbright Amendment. There is no doubt about it, that the Lukens case, in 310 U. S., would have kept these plaintiffs out of court. There is equally no doubt in my mind, in this preliminary stage of this case, that Senator Fulbright and the Congress, which went along with him, intended to cure

that and to open the door to plaintiffs such as these to the courts to obtain the very kind of review they are seeking here.

Now, I do not pass upon the merits, and the opinions I express in that regard, insofar as they may concern the merits, are very definitely curbstone. This case will not come before me, since I am in the Motions Court, and I do now advance the case for final hearing; since it is a matter that should not be left hanging in a state of hiatus.

I believe my duty at this point is absolutely clear; and that is to stay the effective date of this order.